

SILVERADO NEVADA, INC.

IBLA 99-23 through 99-31

Decided June 22, 2000

Appeal of nine decisions by the Nevada State Office, Bureau of Land Management, rejecting color-of-title applications N-58145 through N-58153.

Affirmed in part, set aside in part and remanded.

1. Administrative Appeals--Administrative Practice--  
Administrative Procedure: Administrative Record--  
Appeals: Generally

Upon receipt of an appeal, BLM is required to forward to the Board the complete, original administrative record, including all original documentation. A decision may be set aside and remanded when the record does not allow review of the basis upon which the decision was made or the documentation does not support the factual findings placed at issue by the appeal.

2. Administrative Procedure: Administrative Record--  
Administrative Procedure: Judicial Review--Board of  
Land Appeals--Judicial Review

Subject to Secretarial review, a decision by the Interior Board of Land Appeals is final for the Department. If the Board's decision is appealed to Federal court, the Board must be able to certify that the record it submits to the court is the complete record that it reviewed and upon which its decision was based.

3. Color or Claim of Title: Generally--Evidence:  
Burden of Proof

When BLM has not notified a Color of Title Act applicant to provide an abstract of title or other documentation to establish color of title, the applicant cannot be found to have failed to bear its burden of proof and the application can be denied only if, as a matter of law, a specific deficiency precludes the applicant from qualifying.

## 4. Administrative Authority: Generally--Courts

Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another department of government.

## 5. Color or Claim of Title: Good Faith

While a Color of Title Act applicant must have acquired its interest in the land in good faith, and thus without knowledge that title to the land properly resides in the United States, knowledge that the title is uncertain because it is in litigation is neither knowledge that title belongs to the United States nor a basis to find that it was unreasonable for a party to believe it held title.

## 6. Color or Claim of Title: Generally

An applicant under the Color of Title Act can receive only a maximum of 160 acres based upon a single claim of color of title. When an application is for more than 160 acres, the Act authorizes the Department to select the land to be patented.

APPEARANCES: James R. Arnold, Esq., San Francisco, California, for Silverado Nevada, Inc.; Clementine Berger, Esq., Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management; Karen Budd-Falen, Esq., Cheyenne, Wyoming, for the Intervenor, Lake at Las Vegas Joint Venture.

## OPINION BY ADMINISTRATIVE JUDGE IRWIN

Silverado Nevada, Inc. (Silverado), has appealed nine decisions dated August 26, 1998, issued by William K. Stowers, Lands Team Lead, Nevada State Office, Bureau of Land Management (BLM), each rejecting an application Silverado filed in December 1993 under the Color of Title Act (CTA), 43 U.S.C. ' 1068, 1068a-1068b (1994). As amended, the nine applications concern approximately 1,200 acres in secs. 26-27 and 34-35, T. 21 S., R. 63 E., Mount Diablo Meridian, Clark County, Nevada. The decisions are identical except for the description of the land sought by each application. 1/

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1/ Silverado originally filed 11 applications, N-58145 through N-58155, but by letter dated Jan. 27, 1994, withdrew applications N-58154 and N-58155 in their entirety and withdrew some of the lands requested in applications N-58145, N-58146, and N-58151. Although BLM acknowledged the changes by letter dated February 15, 1994, and said its records had been changed accordingly, BLM's decisions concerning N-58146 and N-58151 do not reflect the changes in description or acreage stated in Silverado's Jan. 27, 1994, letter, and its decision concerning N-58145 does not reflect the changed acreage.

We denied Silverado's petition for a stay of the decisions by Order dated November 3, 1998. By Order dated April 6, 1999, we granted Lake at Las Vegas Joint Venture's (LLV's) request to intervene, because a portion of the land at issue is the subject of a proposed land exchange between LLV and BLM, and granted requests by BLM and LLV to afford the appeal expedited consideration. With its Statement of Reasons (SOR) filed May 14, 1999, Silverado filed a petition requesting the Board to refer the case for a hearing under 43 C.F.R. ' 4.415. For reasons discussed below, that petition will be denied and BLM's decisions will be affirmed in part and in other respects set aside and remanded. 2/

### Background to the Appeals

Silverado claims color of title as successor-in-interest to Manganese, Inc. 3/ Manganese acquired its interest by a May 13, 1955, quitclaim deed from the Reconstruction Finance Corporation (RFC) and the United States of America "both acting by and through the Administrator of General Services." (SOR, Exh. 1 at 1.) The deed states in relevant part that it quitclaims "all of the Grantor's interest in and to the following described premises situate in the Las Vegas Manganese Mining District in the County of Clark, State of Nevada, consisting of thirteen (13) patented mining claims and thirty-two (32) located claims known and described as follows \* \* \*." Id. The description lists both the patented claims and the "unpatented claims (located)" by claim name and the book and page where the certificate of location is recorded. 4/ Silverado's applications concern only the unpatented claims.

2/ Silverado has also requested the Board to order the Regional Solicitor to provide copies of documents which it and BLM have received from LLV. Although LLV initially opposed granting the request, as did BLM, it has subsequently provided the Board and Silverado with copies of two drafts of its Response brief. To the extent Silverado seeks copies of other documents LLV has filed with BLM, neither the request nor the record before the Board indicates that such documents exist, other than, as explained by the Office of the Solicitor in its response to the request, documents related to LLV's proposed land exchange which are available for public review in BLM's Las Vegas Field Office and the Nevada State Office. (BLM Response to Aug. 3, 1999, Order at 2.) Silverado describes communication between LLV and the Regional Solicitor's Office as being ex parte.

(Response to BLM's and LLV's Objections to Order for Production at 1, 3, 4; Reply at 9-10.) The characterization is incorrect and Silverado does not identify any legal authority for finding such communication to be improper. See 43 C.F.R. ' 4.27(b)(1). Accordingly, its request is denied.

3/ Although the instructions on the application, Form 2540-1, state that question 5 ("What is the basis for your claim?") is to be completed "only if you are not claiming land as record title owner," Silverado stated that the basis for its claim was "as successor in interest to Manganese Ore Co. (Manganese obtained title through quitclaim deed through the Administrator of General Services, under and pursuant to the powers and authority contained in the provisions of the FPASA [Federal Property and Administrative Services] Act of 1949)."

4/ Although the deed says that it grants 32 "located claims," it lists only 31 claims; one of them (the Hydro 30-A) apparently is a relocation

When Silverado filed its applications in 1993, the lands it sought and the 1955 quitclaim deed to Manganese had been the subject of litigation for some time. In March 1989, J.C. and Fern Lancaster brought a quiet title action in the Eighth Judicial District Court, Clark County, Nevada, against Leonard A. Roy, Sr., and Shirley H. Roy, both sides claiming fee title under the Manganese deed. 5/ Prior to trial, the court granted partial summary judgment to the Lancasters, ruling that as a matter of law they held fee simple title, and denied the Roys' motion to join the United States as an indispensable party. "The court subsequently granted sole title and interest in the property to [the Lancasters]." Roy v. Lancaster, 107 Nev. 460, 814 P.2d 75, 75-76 (1991).

On appeal by the Roys, the Supreme Court of Nevada reversed. It found that "the district court was misled by the parties' agreement that a fee simple title to the unpatented claims was created when RFC transferred the claims to Managanese, Inc., in 1955." Id. at 76. The court stated:

It is undisputed that the deeds in question conveyed unpatented mining claims. An unpatented mining claim represents only a possessory interest. It does not confer fee simple title. "Congress has seen fit to make possession of that part of the public lands which is valuable for minerals separable from the fee. . . ." Belk v. Meagher, 104 U.S. 279, 283, 26 L.Ed. 735 (1881). "The patent is the instrument by which the fee simple title to the mining claim is granted." Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel Mining & Transp. Co., 196 U.S. 337, 347 (1905). \* \* \* Therefore, in the absence of proof that the Hydro-A [unpatented] claims at issue were ever patented, fee simple title to them remains vested in the United States.

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fn. 4 (continued)

of two mill sites. Eighteen of the claims are the Hydro 13-A through the Hydro 30-A. For this reason, the claims have been referred to as the Hydro-A claims.

5/ "On November 16, 1961, Manganese, Inc., quitclaimed its interest in the unpatented Hydro-A claims to Milton J. Wershow Company (Wershow). Wershow, in turn, quitclaimed them to the Clark County Land & Water Company on February 13, 1963. On March 15, 1976, Valley Bank of Nevada, as trustee for the Clark County Land & Water Company, deeded the claims to \* \* \* J.C. and Fern Lancaster.

"On January 30, 1980, \* \* \* Leonard and Shirley Roy secured a quitclaim deed to approximately six hundred acres of property from Howmet Corporation, the successor in interest to Manganese, Inc. The Roys' deed encompassed the same Hydro-A unpatented claims that Valley Bank had quitclaimed to the Lancasters in 1976, as well as additional claims not included in the Lancaster deed."

Roy v. Lancaster, 107 Nev. 460, 461, 814 P.2d 75, 76 (1991).

Id. at 77. The 1955 quitclaim deed could not have conveyed fee simple title, the court continued, because:

The General Mining Law of 1872 established detailed procedures for the patenting of mining claims that are still followed today. \* \* \*

The district court was not presented with evidence that either of the parties had complied with the federal patenting requirements. Allowing respondents [Lancasters] to obtain fee simple title to the disputed claims by virtue of a quitclaim deed renders the federal patenting procedure meaningless.

Id. The Supreme Court of Nevada also concluded that the district court had erred in failing to join the United States as a party, stating that, as plaintiffs below, the Lancasters "were aware, or should have been aware through the exercise of reasonable diligence, of the United States' interest in the subject property. In the absence of a patent on the disputed claims, the United States retains fee simple title to the land in question." Id.

On remand to the Eighth Judicial District Court, the United States became a party and removed the case to the U.S. District Court, District of Nevada. On September 16, 1994, the U.S. District Court issued findings of fact and conclusions of law. Its ultimate conclusion was that:

the 1955 deed conveyed to Manganese unpatented mining claims and not the fee to the land encompassed by the unpatented mining claims. The clear and unambiguous language of the 1955 deed reflects the conveyance of only unpatented mining claims.

The clear intent of the parties was that the 1955 deed conveyed only unpatented mining claims.

Lancaster v. Roy, et al., CV-S-93-263-HDM(LRL) (D. Nev. Sept. 16, 1994) at 15, Conclusion of Law No. 30. Accordingly, the U.S. District Court entered judgment in favor of the United States and against both the Lancasters and the Roys and quieted title in the name of the United States. Lancaster v. Silverado Nevada, Inc., et al., CV-S-93-263-HDM(LRL) (D. Nev. Oct. 12, 1994) at 2-3. 6/

It appears that both the Lancasters and Silverado sought review of the U.S. District Court's decision by the U.S. Court of Appeals for the Ninth Circuit. In an unpublished memorandum decision dated April 14, 1998, the Ninth Circuit stated that it was "divided on whether the 1955 quitclaim deed is unambiguous," but that it "need not resolve the issue, because we

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6/ The court's "Findings of Fact and Conclusions of Law" names J. C. and Fern Lancaster as plaintiffs and Leonard A. Roy, Shirley H. Roy, Silverado Nevada, Inc., and other parties as defendants, while its Judgment omits the Roys, identifying Silverado as the first defendant.

come to the same conclusion either way." Lancaster v. United States of America and Silverado Nevada, Inc., No. 95-15490 and No. 95-15496, Memorandum at 3; 142 F.3d 444 (9th Cir. 1998) (table).

If the 1955 deed is not ambiguous, then it conveyed only the claims, not the fee. If the 1955 deed is ambiguous, then the district court's findings of fact, which were not clearly erroneous, establish that the intent of the parties was to convey only the claims, not the fee.

Id. at 4. Accordingly, the Ninth Circuit affirmed the U.S. District Court's decision.

While the litigation was in progress, BLM did not work on Silverado's applications. In November 1994, Silverado wrote the BLM Nevada State Director informing her of the U.S. District Court's September 1994 decision. 7/ Silverado stated that it was preparing an appeal but requested BLM proceed with its applications. However, the Las Vegas District Manager wrote the State Director, stating:

We can not spend time and effort on cases that may or may not be valid. The defendant [Silverado] has stated that an appeal will be filed. In the event that an appeal is filed and a decision is rendered in favor of the defendant the application would be rejected.

On January 31, 1995, the State Director wrote Silverado stating: "Upon resolution of the appeal, the [BLM] will proceed with adjudicating Silverado's Color-of-Title applications prior to processing any exchanges or other claims affecting the property."

After the Ninth Circuit issued its decision, the U.S. Attorney, U.S. Department of Justice, wrote to BLM on April 21, 1998, informing it of the decision and noting that it would not be final until the period for filing a petition for rehearing with the court or a petition for writ of certiorari with the U.S. Supreme Court had passed. On August 25, 1998, BLM received a letter from the U.S. Attorney stating that the time for filing had passed, no petition had been filed, the case was closed, and he was "returning \* \* \* the records, exhibits and other materials \* \* \* received from [BLM] and other sources" in connection with the litigation. "The documents that I am sending are in eleven boxes," he stated, and he enclosed an index describing the contents of each box as containing

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7/ Silverado noted in its letter that it had met with BLM Las Vegas District Office staff and that, after the meeting, the attorney for the United States who was present at the meeting "took with him the maps and [aerial] photographs which we submitted as part of our color-of-title applications." The documents are not part of the record before the Board.

Silverado's Jan. 27, 1994, letter to BLM also refers to "copies of maps which delineate the area of each application and show thereon some of the improvements." It is not apparent that they are the same maps included in the case files.

deposition transcripts, trial court pleadings, trial transcripts, trial exhibits, BLM documents, state court trial exhibits and documents, and a "BLM Course Study Book--Legal Description and Land Status." The letter requested that BLM "maintain one set of all parties' trial exhibits, the trial transcripts and the deposition transcripts until the color of title applications are resolved."

The next day, August 26, 1998, BLM issued the decisions Silverado has appealed.

#### Issues to be Addressed

As presented to the Board on appeal, there are four matters to address. First, Silverado challenges not only BLM's conclusions about its applications but also the sufficiency of the record upon which they were made. Its SOR and Petition for Administrative Hearing (Petition) assert that BLM's decisions are based on documents which do not appear in the record BLM submitted to the Board and that the record does not allow the Board to independently review the decisions. (SOR at 1-2; Petition at 2.)

Silverado argues that BLM's decisions are subject to reversal under Board precedent such as Save Our Cumberland Mountains, Inc., 108 IBLA 70, 96 I.D. 139 (1989). (Petition at 10-11.)

In addition to requesting a hearing, Silverado seeks to have the evidence introduced at trial made part of the record and requests that the Board take official notice of the records of the litigation in both the Nevada and Federal courts. (SOR at 1, n.1; SOR at 15.) Silverado also states that it "has recovered a substantial amount of new evidence from the national archives" which "supports the original contentions of the Roys and Silverado, namely, that the United States conveyed the fee title to the property with its 1955 Deed." (Petition at 11.) This evidence, Silverado contends, also supports its claim that it and its predecessors-in-interest reasonably and in good faith believed that the 1955 quitclaim deed transferred title to the land. (SOR at 2.) Silverado has submitted a Reply and Supplemental Brief (Reply) with numerous documents as exhibits, including 30 it identifies as National Archives exhibits.

BLM's Response to Silverado's SOR does not address Silverado's assertions about the adequacy of the record before the Board. 8/ However, it opposes Silverado's request for a hearing, stating that "sufficient documentation exists to demonstrate that Silverado cannot meet the requirements of the Act" and that "[t]he record should be reviewed (and supplemented if necessary)" before referring the matter for a hearing. (BLM Opposition to Petition at 4.) BLM points out that Silverado may supplement the record as it wishes and that the Board "may call for additional documents." Id. at 5.

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8/ In regard to the merits of Silverado's applications, the Response largely replicates the decisions, repeating verbatim, or almost verbatim, both statements of fact and legal analysis.

For its part, LLV suggests that, because the CTA does not require a hearing and one has not been held, "an official 'record' has not been created upon which the IBLA must base its decision" and the Board "may decide this appeal based upon any evidence which is open to inspection by the parties to the appeal." (LLV Answer at 3-4.) LLV notes that "[i]n this case that evidence includes 16 boxes of documents and materials open to inspection at the BLM Nevada State office in Reno, Nevada." Id. at 4 n.2. LLV argues that a hearing is not needed because:

An official "record" subject to judicial review need only be created once a "final agency action" is challenged in a court of law. The BLM's decisions which are now on appeal before the IBLA are being reviewed on a de novo basis. There is no final agency action on the part of the Department of the Interior in this case. The IBLA is free to examine any evidence it wishes, regardless of whether or not the BLM used such evidence in making its decisions. The "record" is yet to be created.

(LLV Opposition to Petition for Administrative Hearing at 3.)

Related to questions about the adequacy of the record is a second issue raised by BLM's explanation that its decisions "relied significantly on state and federal court quiet title actions" and that "[a]s a matter of law, BLM was obligated to defer to these judicial findings in accordance with the doctrine of issue preclusion (collateral estoppel)." (BLM Response at 4.) BLM "urges IBLA to recognize the judicial rulings in this case as they relate to the issues and parties" in the appeal. Id. LLV asserts that "[m]any of the findings of fact fundamental to the BLM's rejection of Silverado's CTA applications have already been determined by various state and federal courts of law," and the doctrine of collateral estoppel made "BLM's deferral to these findings of fact mandatory," and "[t]he IBLA is likewise bound to do so." (LLV Response at 4.)

In contrast, Silverado claims that the only effect of the Federal litigation "is the determination that the United States owns the property which is the subject of the present applications \* \* \*." (SOR at 6.) Its Reply brief devotes considerable discussion to establishing that issue preclusion, under the doctrine of res judicata, does not apply to rulings of the U.S. District Court and does not limit the Board's de novo review authority. (Reply at 2-13.)

The third issue relates to the second. The initial and primary matter addressed in BLM's decisions is that the parties in Silverado's asserted chain of title did not hold the land in good faith. Among other matters, the decisions identify the fact that the 1955 quitclaim deed "clearly states on its face that it is transferring mining claims" as a basis for rejecting the applications. (Decisions at 3.) LLV specifically argues that, due to the judicial rulings, Silverado is collaterally estopped from claiming that Manganese believed in good faith that it owned the land in fee simple. (LLV Response at 6, 22, 24-27.) In addition, BLM's decisions find that Silverado lacked good faith because it knew of the litigation and therefore had reason to know the United



States had title. (Decisions at 4-5.) In response, Silverado claims that BLM's position regarding the 1955 quitclaim deed "flies in the face" of the Court of Appeals' statement that it was divided as to whether the deed was ambiguous. (SOR at 15-16.) Silverado argues that BLM has erroneously interpreted William T. Bertagnole, 87 IBLA 34 (1985), and Lester & Betty Stephens, 58 IBLA 14 (1981), which the decisions cite as supporting a standard that "[s]uspicion of ownership by the United States constitutes lack of good faith." (Decisions at 4; SOR at 8-10.) In addition, Silverado argues that, in the circumstances in which the parties acquired their interests, there was a reasonable good faith belief they held fee simple title. (SOR at 6-8, 10-14; Reply at 45-63.)

The fourth issue to be addressed concerns the statements in BLM's decisions that "[t]he Color of Title Act \* \* \* states that a patent may be issued for not to exceed 160 acres" and that "[i]t is not appropriate to attempt to circumvent the 160-acre limitation \* \* \* and acquire a greater acreage by breaking the area claimed under color-of-title into several applications." (Decisions at 10-11.) In support, BLM and LLV cite decisions of this Board. (BLM Response at 5-6; LLV Response at 14-15.) Silverado's Reply analyzes those cases to argue that the CTA does not prohibit granting several applications. (Reply at 88-91.)

#### The Record

As the record for its decisions, BLM forwarded to the Board nine case files, one for each application, and a notebook prepared after a field examination was conducted on September 1, 1993 (prior to Silverado filing its applications). <sup>9/</sup> Except for the case file for application N-58145, the same documents appear in each of the case files, specific information varying for each application. <sup>10/</sup> The lead case file for N-58145 contains in addition the April 21, 1998, and August 24, 1998, letters from the

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<sup>9/</sup> The notebook includes: (1) a "Technical Report Regarding Lands under Investigation by the Bureau of Land Management because of Litigation in the Case of Lancaster v. Roy et al." prepared by Thomas S. Cook and dated Sept. 6, 1993, based upon a field examination, (2) a report entitled "The Three Kids Mine Company Town: The Archaeology and History of a Short-Lived Residential Complex" (ARSN Report 4-3-6, Apr. 1992), prepared by Dr. Kevin Rafferty, Archaeological Research of Southern Nevada, North Las Vegas, Nevada, for the Lake Las Vegas Resort of Henderson, Nevada, (3) an Aug. 21, 1972, "Load [sic] Claim Map of the Three Kids Mine Group" identified as recorded in the Clark County, Nevada, land records, and (4) 102 photographs of the unpatented mining claims, identified as to location in the "Technical Report" and on the 1972 map.

<sup>10/</sup> Apart from copies of correspondence, the documents are: (1) Silverado's application, (2) portions of the Master Title Plat showing the location of the claimed land and notation of the applications, (3) the Ninth Circuit's Apr. 14, 1998, memorandum decision (4) the U.S. District Court's Sept. 16, 1994, decision, (5) an undated, unsigned list of improvements on the land requested in the application, (6) BLM's decision, (7) Silverado's notice of appeal, and (8) Silverado's petition for a stay of BLM's decisions.

U.S. Attorney to BLM and three additional documents that evidently originate in the 11 boxes he sent. 11/

It is clear that we have only a small portion of the record upon which BLM's decisions are based. BLM did not forward to the Board the 11 boxes of documents it received from the Justice Department, several of which are identified in the Justice Department's index as containing BLM documents. In addition, as quoted above, LLV refers to 16 boxes of documents held by the Nevada State Office. (LLV Answer at 4, n.2.) Assuming 11 of them are those sent by the Justice Department, there is no indication as to the content of the additional five boxes.

[1] Upon receipt of an appeal, BLM is required to forward to the Board "the complete, original administrative record \* \* \*, including all original documentation involved in the matter" and a decision "may be set aside and remanded if it is not supported by a case file providing information upon which the Board may conduct an independent, objective review of the basis of the decision." Save Our Cumberland Mountains, Inc., 108 IBLA 70 at 84, 96 I.D. 139 at 147 (1989); see Utah Chapter Sierra Club, 114 IBLA 172, 174-75 (1990). We do not automatically set aside and remand an agency's decision when the record is incomplete if the record that has been provided allows review of the factual basis for the decision and supports the facts that are challenged on appeal. See Great Western Onshore, Inc., 133 IBLA 386, 396-97 (1995); Shell Offshore, Inc., 116 IBLA 246, 249 (1990). As a matter of practice, we allow parties to supplement the record by submitting exhibits with their briefs. B. K. Killion, 90 IBLA 378, 381 (1986); In Re Lick Gulch Timber Sale, 72 IBLA 261, 273 n.6, 90 I.D. 189, 196, n.6 (1983). In this case, Silverado provided a copy of the 1955 quitclaim deed with its SOR, LLV submitted 20 documents as exhibits to its brief, and Silverado has provided numerous documents with its Reply. Although, as BLM notes, we may direct an agency to provide a specific document that is referred to in the record it submits and that appears critical to review of an appeal but is missing from the record, in this case it is not clear what documents BLM relied on in making its decision and it would be neither practical nor consistent with an efficient, expedited resolution of the issues in this appeal to request BLM to submit all 11 (or 16) boxes. "It is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision, as well as being demonstrated in the administrative record

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11/ One, marked Government Exhibit G-FV, is a copy of pages 1-2 and 63-79 of the May 9, 1990, trial transcript for "Lancaster v. Roy," Case No. A 273150, District Court, Clark County, Nevada, which records a portion of the testimony of Leonard A. Roy, Sr. (without exhibits). The second, marked Government Exhibit G-GQ, 93-263, is "The Three Kids Mine Company Town" report that was included in the notebook described supra note 9. The third is an unsigned copy of a Nov. 21, 1991, 81-page deposition of Leonard A. Roy, Sr., in a case titled "Sam's Ranch Estates, Inc. v. Chicago Title Insurance Co.," Case No. A285983, District Court, Clark County, Nevada (without exhibits). In addition, this case file includes a two-page "Analysis of Color-of-title Claims Re: Lancaster v. Silverado."

accompanying the decision." The Navajo Nation, 152 IBLA 227, 228 (2000). Our role is to review the record the agency compiled, not to coax it or coach it into providing a record that will adequately support the agency's decision.

[2] LLV's contention that the state of the present record does not matter because an "official record" supporting BLM's decision will not be created unless and until a judicial appeal is filed is mistaken. Subject to Secretarial review, this Board's decision is final for the Department. 43 C.F.R. ' ' 4.1, 4.21(d); Mobil Oil Exploration & Producing Southeast, Inc., 90 IBLA 173, 177 (1986), appeal dismissed, Civ. No. 385-87-L, Cl. Ct. Nov. 5, 1991. When the Board's decision is appealed to Federal court, it is the Board's decision, not BLM's, which is the immediate subject of the court's review. The Board must be able to certify that the record it submits to the court is the complete record that it reviewed and upon which its decision was based. That record, including any documents the Board has allowed the parties to provide, will be the administrative record submitted to the court for purposes of judicial review. Id.; Shell Offshore, Inc., 113 IBLA 226, 233-34, 97 I.D. 73, 77-78 (1990). The reviewing court, of course, may admit additional documents. See Cronkhite v. Kemp, 741 F. Supp. 828, 830 n.2 (E.D. Wash., 1990).

In particular, the record before the Board is deficient in regard to BLM's review of Silverado's claim of color of title. The regulations require Silverado to provide "[i]nformation relating to all record and nonrecord conveyances, or to nonrecord claims of title, affecting the land" on a form approved by the Director, and state that "statements of record conveyances must be certified by the proper county official or by an abstractor." 43 C.F.R. ' 2541.2(c)(1). Silverado's applications included Forms 2450-2, "Conveyances Affecting Color or Claim of Title," but the certifications were not signed. 12/ In accordance with the general instructions on Form 2450-1, Silverado did not provide any supporting documentation. 13/ The regulations, however, provide that an "applicant may be called upon to submit documentary or other evidence relating to conveyances or claims." Id. The case files do not indicate that BLM notified Silverado that it should provide an abstract of title or other evidence of

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12/ The form lists:

<u>Grantor</u>	<u>Grantee</u>	<u>Date</u>
G.S.A.	* Manganese Inc.	7/27/55
Howmet Corporation	Nevada Disposal Inc.	2/19/80
Nevada Disposal Inc/ Leonard A. Roy, Estate of	Silverado Nevada, Inc.	7/22/93

The starred note for Manganese, Inc., states: "Manganese Inc., became Howe Sound Company under Agreement of Merger dated March 5, 1962 and filed March 5, 1962. Further, Howe Sound through its Board of Directors changed its name to Howmet Corporation of Ohio on December 2, 1965."

13/ "Do not submit abstracts of title or other documentary evidence with this application. Such evidence may be requested later and, if so, will be returned to you." See 43 C.F.R. ' 2541.2(c)(1).

its color of title. Nevertheless, BLM's decisions state "there is no documentation submitted with the application to demonstrate that a purported chain of title exists to the applicant, Silverado." (Decisions at 8.) 14/

[3] "An applicant under the Color of Title Act has the burden of proof to establish to the Secretary of the Interior's satisfaction that the statutory requirements for purchase under the Act have been met." Corrine M. Vigil, 74 IBLA 111, 112 (1983); Jeanne Pierresteguy, 23 IBLA 358, 362, 83 I.D. 23, 25 (1975). Although an applicant bears the burden of proving it is entitled to what it has applied for, it must be given the opportunity to do so.

While it is incumbent upon appellant to carry the burden of proof with respect to her claim, most, if not all, of the reasons for rejection may have been answered if appellant had been given an opportunity to submit abstracts and further evidence and data with respect to her claim. The instructions specifically told her not to do so and there was never a request for additional proof prior to rejection. If the factual evidence necessary to sustain the burden of proof is not found on the face of the application, BLM should give an applicant the opportunity to submit evidence prior to rejection. If, however, it is apparent from the face of the application that the application should be denied as a matter of law, it would not be necessary to request further facts prior to rejection.

Corrine M. Vigil, 74 IBLA 111, 113 (1983) (footnote omitted). Because we do not have the record BLM reviewed, we cannot determine whether Silverado has met its burden of proof to establish color of title; indeed, it is not our responsibility to do so in the first instance. See California Association of Four-Wheel Drive Clubs, 30 IBLA 383 (1977). The documents Silverado and LLV have provided on appeal provide insight into possible issues raised by Silverado's applications, but they cannot serve as the basis for us to determine color of title. We cannot assume they are the only documents Silverado would rely upon.

Without an adequate record, we can affirm BLM's decisions only if we conclude that, as a matter of law, a specific deficiency precludes Silverado from qualifying under the CTA. Otherwise, our inability to

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14/ Under these circumstances, it is unclear why BLM proceeded to review the applications. A determination that Silverado holds color of title logically precedes review of other requirements. Silverado notes that the record lacks documents of "the title transfer between the Roys, their estate, and [Silverado]" and requests leave to supplement the record. (SOR at 8 n.10.) We note that the record does not provide any information about Nevada Disposal, Inc., the grantee of the quitclaim deed from Howmet, and, consequently, the interest Leonard and Shirley Roy held in the lands. We further note, as discussed below, that the record lacks documentation regarding Howmet.

review the factual basis of BLM's decisions on the record provided is a sufficient basis to set aside those decisions and remand these cases. Mesa Operating Limited Partnership (On Reconsideration), 128 IBLA 174, 185-86, 101 I.D. 8, 14 (1994).

### Estoppel

It is apparent BLM did not forward the complete record because, as it explains, its decisions substantially rely upon the judicial decisions. (BLM Response at 4.) The extent of BLM's reliance is obvious. For example, paragraphs 2-5 of BLM's decisions are a modified version of the U.S. District Court's September 1994 findings of fact, including most of its quotation of the Supreme Court of Nevada's opinion. Compare Lancaster v. Roy, *supra* at 1-5, Finding of Fact nos. 1-3, 6-8, 11-12, 15-16 with Decisions at 1-3. 15/ We agree with BLM that it was bound by the decisions of the Federal courts, but only to the extent discussed below.

Collateral estoppel and res judicata are judicially created doctrines, supported by a variety of considerations of public policy, which are designed to bring an end to litigation. See 46 Am. Jur. 2d, Judgments ' ' 514-15, 522 (1994).

Under the doctrine of res judicata, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." Montana v. United States, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979). Under collateral estoppel principles, once an issue is actually litigated and necessarily determined, that determination is conclusive in subsequent suits based on a different cause of action but involving a party or privy to the prior litigation. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5, 99 S.Ct. 645, 649 n.5, 58 L.Ed.2d 552 (1979).

United States v. ITT Rayonier, Inc., 627 F.2d 996, 1000 (9th Cir. 1980) (emphasis supplied). The concepts are related, and both have been treated under the rubric of "res judicata." See 46 Am. Jur. 2d Judgments ' 514, 517 (1994); Lawlor v. National Screen Service Corp., 349 U.S. 322, 326 (1955). Whatever term is used, the doctrines preclude relitigation of a matter which has already been decided by a court in a final judgment on the merits. Their application depends upon delineating those matters which were "distinctly put in issue and directly determined" by the court in the prior judicial action. State of Alaska, 140 IBLA 205, 211 (1997); Eva Wilson Davis, 136 IBLA 258, 263 (1996), quoting Montana v. United States, *supra* at 153; see 46 Am. Jur. 2d Judgments ' ' 530-550 (1994).

As BLM points out, courts have applied collateral estoppel, as well as res judicata, to decisions of administrative agencies, although they do

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15/ Page 10 of BLM's decisions includes three indented paragraphs based on the conclusions of the U.S. District Court regarding ownership of the lands. See Conclusions of Law nos. 7, 30, and 31 in Lancaster v. Roy, et al., *supra* at 8 and 15.

so in appropriate cases and not uniformly. (Response at 4; see K. Davis and R. Pierce, Administrative Law Treatise, ' 13.3, 13.4 (3rd ed. 1994).)

In addition, as LLV points out, at least one court has approved application of collateral estoppel by an agency to rely upon a prior judicial decision. See Graybill v. United States Postal Service, 782 F.2d 1567, 1570-71 (Fed. Cir. 1986).

Res judicata and collateral estoppel are, however, affirmative defenses asserted by a party in a proceeding. See F.R.C.P. 8(c). BLM does not identify any specific argument that it believes Silverado is precluded from raising in its appeal to us or any particular facts that it is precluded from asserting in support of its applications. The only specific point LLV raises, as noted above, is that Silverado is estopped from claiming that Manganese believed it owned the land in fee simple. (LLV Response at 5-6, 25, 36.)

[4] The judicial power of the United States resides in the Federal courts. U.S. Const. Art. III, ' 1. As an administrative agency which is part of the executive branch of government, we, as well as BLM, are bound by decisions of the Federal courts. "Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government." Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 113 (1948); see United States v. Ferreira, 19 U.S. (13 How. 40) 373 (1851); Henry A. Pratt et al., 5 L.D. 185, 186 (1886). Accordingly, we adhere to the decisions of the U.S. District Court and the U.S. Court of Appeals for the Ninth Circuit.

Whether or not a decision by a state court has the same binding effect, it may be entitled to preclusive effect under the doctrine of collateral estoppel. See Graybill v. United States Postal Service, *supra* at 1571 (invoking the Full Faith and Credit Clause as implemented by 28 U.S.C. ' 1738 (1994)). In this case, the Nevada court decisions are not so entitled. It appears that the United States argued in U.S. District Court that Silverado was estopped in some regard under the Supreme Court of Nevada's decision. The U.S. District Court's decision described several of the Nevada Supreme Court's conclusions and ruled that: "A party added to a suit after the initial determinations of the court with jurisdiction may invoke the doctrine of collateral estoppel or issue preclusion against the party who litigated the issue." Lancaster v. Roy, et al., *supra* at 14-15, Conclusion of Law No. 29. 16/ Without describing the arguments raised on appeal, however, the U.S. Court of Appeals ruled:

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16/ The consequences the court gave this ruling are unclear. It seems to have denied the Government's motion for summary judgment and several portions of its decision address arguments, presumably raised by Silverado, that provisions of the 1955 quitclaim deed are ambiguous. See Lancaster v. Roy, et al., *supra* at 3, 7-8, Finding of Fact No. 10, Conclusions of Law nos. 4-5. If the court regarded the Nevada Supreme Court's decision as legally conclusive in determining that the United States held title to the lands, see Lancaster v. Roy, et al., *supra* at 14, Conclusion of Law No. 29, it is unclear what matters occupied the 8 days of trial held over 3 months. See LLV Response at 12.

We agree with Silverado and Baer [17/] that the district court erred in finding issue preclusion on account of the Nevada Supreme Court decision. It was not final, and the parties had no incentive to litigate a position contrary to the one urged by the United States. See Luben Industries, Inc. v. United States, 707 F.2d 1037, 1039-40 (9th Cir. 1983).

Lancaster v. United States, *supra* at 2. Consequently, neither Silverado nor BLM is bound by the Nevada Supreme Court's decision. In addition, because the Nevada Supreme Court reversed the decision of the Nevada district court, the findings and conclusions of the Nevada district court cannot be assigned any binding effect.

#### Good Faith under Color of Title

In relevant part, the CTA provides that the Secretary shall whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than twenty years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation \* \* \* issue a patent for not to exceed one hundred and sixty acres of such land \* \* \*.

43 U.S.C. ' 1068 (1994). Silverado's applications state that it is applying for the lands under Class 1. Similar to the statute, the regulations define a Class 1 claim as

one which has been held in good faith and in peaceful adverse possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years, on which valuable improvements have been placed, or on which some part of the land has been reduced to cultivation.

43 C.F.R. ' 2540.0-5(b).

As determined by the U.S. District Court, after Manganese received the 1955 quitclaim deed:

On November 16, 1961, Manganese quitclaimed the unpatented claims to the Milton J. Wershow Company. On

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17/ Dale K. Baer is one of a number of parties named as defendants in both the U.S. District Court's "Findings of Fact and Conclusions of Law" and Judgment whose interest in the litigation is not disclosed by the record before the Board. Silverado indicates that the Roys sold land to Baer but does not identify the parcel or the specific acreage. (SOR at 12.)

February 13, 1963, Wershow quitclaimed the unpatented claims to the Clark County Land and Water Company. On March 15, 1976, Valley Bank of Nevada, as trustee for the Clark County Land and Water Company, deeded the unpatented claims to plaintiffs J.C. and Fern Lancaster. On January 30, 1980, defendants Leonard and Shirley Roy secured a quitclaim deed to approximately 600 acres of property from the Howmet Corporation, the successor in interest to Manganese. [18/]

Lancaster v. Roy, et al., supra at 3, Finding of Fact No. 12. Silverado does not claim any right under whatever title the Wershow Company may have held. Thus, to qualify under the CTA, Silverado must establish that it and its predecessors-in-interest have had peaceful, adverse possession of the land, under color of title and in good faith, for a continuous period of at least 20 years and have made valuable improvements to the land or have cultivated some portion of it.

In initially addressing the question of good faith, BLM's decisions assert that the 1955 quitclaim deed "clearly states on its face that it is transferring mining claims" and that by letter Manganese "was alerted to the need to perform, and record proof of, annual assessment work upon the subject mining claims." (Decisions at 3.) 19/ "Therefore," BLM concludes, "a color-of title application claiming peaceful, adverse possession in good faith is properly rejected." Id.

BLM's description of the deed is taken from the U.S. District Court's decision which states that "[t]he 1955 deed clearly states that it quitclaims the unpatented claims, not the fee title." Lancaster v. Roy, et al., supra at 2, Finding of Fact No. 8; see Conclusion of Law No. 4. The court also concluded that the intent of the parties had been to convey unpatented mining claims (as well as the patented claims which are not at issue). See Id. at 8-9, 11, 15, Conclusion of Law nos. 5, 8, 13, 19, 30. Because the U.S. District Court, affirmed by the Ninth Circuit, determined that Manganese intended to receive and understood that it held unpatented mining claims and not fee title to the lands at issue, no question can arise as to whether Manganese held the land in good faith under color of title. See Lancaster v. United States, supra at 5 (addressing the U.S. District Court's Finding of Fact No. 19 and Conclusion of Law

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18/ The court's finding as to the acreage secured by the Roys raises a separate question about the basis of Silverado's applications for 1,200 acres.

19/ Silverado correctly points out that the letter to Manganese is not part of the record before the Board. The omission of this particular document is inconsequential, however, because the U.S. District Court found that "[b]etween 1949 and 1960, Manganese, Inc. gave notice of its intention to hold the unpatented mining claims or filed proof of labor showing that assessment work was done on the unpatented claims." Lancaster v. Roy, et al., supra at 3, Finding of Fact No. 11; see id. at 9, Conclusion of Law No. 12. LLV has provided copies of affidavits of assessment work for most years through 1960.



No. 12). Correspondingly, Silverado cannot claim credit for the period that Manganese knew it held unpatented mining claims.

Because Silverado cannot claim that Manganese received fee title, there is no need for the Department to review the documents Silverado has obtained from the National Archives which predate the 1955 quitclaim deed.

The Nevada Supreme Court noted that the "Respondents have failed to present any authority stating that the RFC had the power to transfer fee simple title on behalf of the United States." Roy v. Lancaster, *supra* at 78. On the other hand, the Ninth Circuit stated: "We assume without deciding that appellants are correct, that the deed was made with adequate authority to convey the government's entire interest in the fee." Lancaster v. United States, *supra* at 4. The unresolved questions whether the RFC and the Administrator of General Services had authority to convey fee title, and more particularly whether they had authority to convey unsurveyed, unpatented public land, preclude finding that Silverado knew as a matter of law that the 1955 quitclaim deed did not convey fee title. 20/

At the same time, the fact that the legal effect of the 1955 quitclaim deed was litigated precludes the Department from rejecting it as the basis of Silverado's claim of good faith. However, a deed that conveys an unpatented mining claim cannot as a matter of law serve as the basis for a claim of color of title to the land described, just as a deed conveying a right-of-way or grazing lease could not. See Joe Stewart, 33 IBLA 225, 229 (1977); Carmen M. Warren, 69 IBLA 347, 349 (1982). Therefore, Silverado must establish its claim based upon 20 years of possession of the land under color of title and in good faith by parties subsequent to Manganese.

BLM also relies upon the U.S. District Court's findings to infer that Silverado and the Roys lacked good faith because they could not have reasonably believed that the 1955 quitclaim deed conferred fee title. The decisions state that, because the court found "that the 1955 deed was clear and unambiguous, conveyed only unpatented mining claims, and did not convey the underlying fee[,] \* \* \* Silverado had reason to believe that title to the subject land was in the United States at the time Silverado purchased the subject land." (Decisions at 5.) More broadly, the decisions rely upon Silverado's knowledge of the judicial proceedings. They point out that its applications refer to the state court litigation and that a letter from counsel for Silverado "acknowledges that Silverado knew about the lawsuit and therefore that Silverado did not have clear title to the land by June 4, 1993." (Decisions at 4.) Based upon these facts and the Roys' motion to join the United States as a party, BLM concludes that "Silverado cannot claim color of title in good faith." Id. The next paragraph

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20/ A further reason not to address the documents and Silverado's arguments is that the statutes Silverado discusses do not pertain to subjects about which the Department has "more than ordinary knowledge respecting matters subject to agency regulations." Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); see United States v. Shimer, 367 U.S. 374, 382 (1961). Lacking any special knowledge or expertise, the Department's interpretation of those statutes would not be entitled to deference upon judicial review.

asserts that "[a]t and prior to the purchase, Silverado had actual and constructive knowledge that the United States claimed ownership of the subject land and had reason to believe that title to the subject land was in the United States \* \* \*." Id. Four of the five numbered paragraphs which follow describe the history of the litigation. <sup>21/</sup> A final paragraph refers to the "public records" of Manganese's proofs of labor and states that, by the time Silverado filed its applications, the United States "had filed its answer asserting ownership of the land" and a motion for summary judgment and, due to the Nevada Supreme Court's decision, Silverado was aware "that no patent had been issued by the United States for the lands in question." Id. BLM again "concludes that Silverado did not hold the claim of color-of-title in good faith. While it may have believed it had a claim of color of title to the property, Silverado's belief was unreasonable." Id.

[5] The problem with BLM's reliance upon facts related to the litigation is that it retroactively applies the outcome of the litigation.

If Silverado had prevailed, the various facts set forth in the preceding paragraph that BLM identifies would be the same, but they would not establish knowledge that the United States held title or that Silverado unreasonably believed it had title. Similarly, the reasoning BLM applies to find a lack of good faith based upon the U.S. District Court's findings could not have been applied before the judicial proceedings were concluded.

To the extent BLM's reasoning allows finding a lack of good faith, it would seem to equally support a conclusion that Silverado knew from the outset that the 1955 quitclaim deed did not convey fee title and, consequently, did not pursue the litigation in good faith. Likewise, LLV's argument that Manganese, the Roys, and Silverado did not, at the relevant times, have a good faith belief that they held title to the lands (LLV Response 24-31) would seem to imply that the Roys and Silverado knew or should have known their legal position in the judicial proceedings was without merit.

Neither the U.S. District Court nor the Ninth Circuit ruled that the deed did not convey fee title as a matter of law. The U.S. District Court's ruling appears to have been made in response to arguments, presumably presented by Silverado, that the 1955 quitclaim deed was ambiguous. Its decision interprets the deed's conveyancing language and determines the intent of the parties. See Lancaster v. Roy, et al., *supra* at 2-3, 7-8, 15, Finding of Fact nos. 8-10, Conclusion of Law nos. 4-9, 30.

As quoted above, the Ninth Circuit was divided as to the ambiguity of the deed but upheld the district court based on the intent of the parties.

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<sup>21/</sup> The fifth paragraph lists a number of rights-of-way and easements issued in 1984 and 1990-93 and the numbers by which they are "recorded." (Decisions at 5.) No supporting documentation appears in the case files. The U.S. District Court's decision refers only to rights-of-way granted in 1954, oil and gas leases issued in 1957, and a 1964 land withdrawal. Lancaster v. Roy, et al., *supra* at 6 and 11, Finding of Fact No. 19, Conclusion of Law No. 20; see Lancaster v. United States, *supra* at 5-6 (findings not clearly erroneous).

Lancaster v. United States, *supra* at 3-4. The U.S. District Court's factual findings do not allow us to conclude that Silverado lacked good faith as a matter of law. While an "applicant must have acquired his interest in the land in good faith, and thus without any knowledge that title to the land properly resides in the United States," Daniel J. Boles, Jr., 137 IBLA 35, 37 (1996); see 43 C.F.R. ' 2540.0-5(b), knowledge that the title is uncertain is neither knowledge that title belongs to the United States nor a basis to find that it was unreasonable for Silverado to believe it had title. We are not willing to conclude from the fact that Silverado knew title to the claims was in litigation when it filed its applications, but ultimately did not prevail, that it cannot show good faith under the CTA.

In regard to the Roys, the BLM decisions state that "after examining the facts and circumstances surrounding the Roys' aquisition of the quitclaim deed from Howmet, BLM concludes that the Roys' belief that there was no defect in the title was also unreasonable." (Decisions at 6.) The discussion which follows refers to language in the deed to Manganese and the 1961 deed to Wershow, Manganese's affidavits of assessment work, the Roys' motion to join the United States as a party to the Nevada state court proceedings, and testimony by Leonard A. Roy, Sr., about the amount paid to Howmet for 600 acres compared with the amount the Roys had agreed to pay the Lancasters for 300 acres of nearby land. *Id.* The U.S. District Court did not make any findings about the Roys' understanding of their rights to the land.

As Silverado points out, there are several questions about the reliability of the additional documents in case file N-58145 upon which BLM apparently bases its conclusion about the Roys. 22/ While questions about the authenticity and completeness of these documents might be easily resolved, their reliability presents a more significant concern. As noted above, the Nevada Supreme Court reversed the decision of the Nevada district court and the trial court's findings cannot be regarded as conclusive. The trial transcripts may provide relevant evidence, but we cannot evaluate the significance of Roy's statements because we are not able to review the context in which they were made, including the remainder of his testimony, the exhibits about which he testified, related testimony by other witnesses, and the factual issues raised by the parties about which

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22/ The deposition of Leonard A. Roy, Sr., in "Sam's Ranch Estates v. Chicago Title Insurance Co.," note 11 *supra*, is not signed and bears an undated, rubber stamp signature as the reporter's certification, and may not have been admitted into evidence in the U.S. District Court proceeding.

(Petition at 2-3, 7.) The portion of the transcript from "Lancaster v. Roy" is truncated, ending in the middle of Roy's testimony, is not certified, and also may not have been admitted into evidence in U.S. District Court. (Petition at 2-3.) In addition, BLM cites transcript pages of Roy's state court testimony as read into the U.S. District Court record which are not included in the case file. (Petition at 5-7.)

the testimony was presented. Nor can we review other evidence which BLM may have examined in reviewing the "facts and circumstances" related to the Roys' good faith.

As BLM's decisions correctly noted, the 20-year period of good faith possession consists of those years immediately preceding the date an applicant learns it does not have title. (Decisions at 4; see Benton C. Cavin, 83 IBLA 107, 127 (1984); Joe I. and Celina V. Sanchez, 32 IBLA 228, 232 (1977); Prentis E. Furlow, 70 I.D. 500, 504-05 (1963); Anthony S. Enos, 60 I.D. 106, 108, (1948), 60 I.D. 329, 331 (1949).) In most cases, the 20-year period is measured back from the date an application is filed because filing to obtain title necessarily recognizes that the United States has title to the land. Alternatively, the period is measured from a date an applicant acknowledges he learned that the United States had title.

This case presents a different situation. Silverado's applications were filed in December of 1993. <sup>23/</sup> Counsel for Silverado explained in a December 20, 1993, letter which apparently accompanied its applications that:

In the pending litigation, Silverado's primary claim is that the Government conveyed fee title in the property through a 1955 Quitclaim Deed to Manganese, Inc. Silverado, as successors in interest to Manganese, Inc., holds fee title to the property.

By filing a CTA application, Silverado has not waived its right to claim title through the 1955 deed and various other deeds. The CTA application is merely an alternative \* \* \* method of establishing Silverado's title to the property. The CTA application is only an alternative pleading \* \* \*.

Silverado has asserted that it cannot be held to have knowledge that the United States had title to the land until the decision of the Court of Appeals was issued on April 14, 1998 (SOR at 8) or at least not before the U.S. District Court entered its judgment (Petition at 13; Reply at 69).

Whether 1993, 1994, or 1998 is considered the determinative date, the 20-year period reaches back to Howmet as Silverado's predecessor-in-interest. As quoted above, the U.S. District Court determined that Manganese quitclaimed its unpatented mining claims to the Wershow Company in 1961, while the Roys acquired their interest in the lands from Howmet in 1980. As previously discussed, due to the U.S. District Court's decision, Silverado cannot claim credit for the period prior to 1961 when Manganese

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<sup>23/</sup> The applications bear a BLM date stamp of Dec. 15, 1994, which has been changed by hand to 1993, crossed out, and initialed. They bear a second date stamp of Dec. 21, 1994, also hand corrected to 1993. Based upon a letter from counsel then representing Silverado, it appears that BLM may have returned the applications when they were first received.

held the mining claims. BLM's decisions, however, do not specifically address the period between 1961 and 1980 when Howmet, as Silverado must assert, held an interest in the lands. Instead, they attribute Manganese's status to Howmet, stating that "[w]hen Manganese, Inc. merged with Howmet, its corporate knowledge of the United States' superior title to the land passed on to Howmet." (Decisions at 7.)

The notion that a merger occurred appears to have been taken from Silverado's applications, see note 12 supra, but the fact is not otherwise supported by the record. As quoted above, the U.S. District Court's decision mentions Howmet only as Manganese's "successor in interest." BLM's decisions do not identify any legal authority for attributing Manganese's "corporate knowledge" to Howmet. Nor has Silverado offered documentation of the relationship between Manganese and Howmet or evidence that the mining claims were identified as property of a merger or other transaction. Consequently, the record before the Board does not provide any basis for concluding that Howmet believed that it held any kind of title or interest in the lands after 1961 and prior to its 1980 quitclaim deed to the Roys. Absent such evidence, whether by conveyance or corporate documents, there is no basis to find that Silverado through its predecessors-in-interest has held the land for 20 years under color of title. Nor can any determination be made as to Howmet's good faith or that it exercised peaceful adverse possession of the lands. These deficiencies may be fatal to Silverado's applications and must be reviewed by BLM on remand.

#### Other Issues

As noted above, BLM's decisions state that the CTA limits a patent to 160 acres and indicates that Silverado cannot acquire greater acreage by its multiple applications. (Decision at 10-11.) In response, Silverado points to the portion of the statute which states: "Provided, That where the area so held is in excess of one hundred and sixty acres the Secretary may determine what particular subdivisions, not exceeding one hundred and sixty acres, may be patented hereunder \* \* \*." 43 U.S.C. ' 1068 (1994). Silverado understands this provision to mean that "if the area held by the applicant is more than 160 acres, the Secretary decides how many 160 acre subdivisions may be patented." (Reply at 88.)

[6] Silverado mistakes the proviso for a delegation of authority. Congress has the power to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." U.S. Const., Art. IV, ' 3; United States v. Fitzgerald, 40 U.S. (15 Pet.) 407, 421 (1841). It has delegated to the Secretary of the Interior responsibility for "the issuing of patents for all grants of land under the authority of the Government." 43 U.S.C. ' 2 (1994). As quoted above, the CTA states that when it has been shown to the Secretary's satisfaction that a tract of public land has been held, "inter alia, "under claim or color of title for more than twenty years," he shall "issue a patent for not to exceed one hundred and sixty acres of such land \* \* \*." 43 U.S.C. ' 1068 (1994). Although apparently never directly at issue, the Department has consistently understood that the CTA limits the Secretary to issuing a patent for no more than 160 acres based upon a single "claim or

color of title." See James R. Biersack, 117 IBLA 339, 344 (1991) (quoting letter from Secretary to Congress); Weathersby Godbold Carter, 97 IBLA 108, 109 n.1 (1987); Robert H. Cooper, 75 IBLA 354, 356 n.1 (1983); Instructions, 52 L.D. 611, 613 (1929) ("does not contemplate the recognition of any claim for more than 160 acres"); see also Albert M. Lipscomb, 99 IBLA 217, 220-21 (1987) (quoting Senate Report "not more than 160 acres").

The matter was most directly addressed in Palo Verde Valley Color of Title Claims, 72 L.D. 409 (1965), rejecting 19 CTA applications:

Another defect in the applications stems from the fact that the lands in question were originally cleared and occupied as a few large holdings. The Color of Title Act clearly contemplates patenting of only 160 acres for each original occupancy. \* \* \* Five original large holdings were broken down, in most cases a few months before applications were filed, so that no individual holding now exceeds the 160 acre limitation of the Color of Title Act. Since the original occupants of the large holdings would have been limited by statute to 160 acres, these occupants cannot defeat the statutory intent by subdividing the land to permit each grantee to qualify for a 160 acre tract under the Color of Title Act.

Id. at 414. The Department's interpretation of the statute is embodied in its regulations, which state that "[t]he maximum area for which patent may be issued for any claim under the act is 160 acres." 43 C.F.R. ' 2541.3(c); see ' 2540.0-3(a). The proviso Silverado points to does not speak to multiple patents but allows the Secretary to determine which legal subdivisions will be patented when an applicant has sought more than 160 acres based upon a single claim of color of title. All nine of Silverado's applications are based upon the 1955 quitclaim deed to Manganese; it can receive title to a maximum of 160 acres. Unless Silverado amends its applications, the provision Silverado quotes authorizes BLM to select the lands to be conveyed, assuming Silverado is otherwise qualified.

Until the 160 acres are identified, either by Silverado or by the Department, two matters related to the applications cannot be reviewed. First, LLV argues that the 1955 quitclaim deed does not adequately describe the land claimed to give color of title. (LLV Response at 18.) The location certificates referred to in the deed and presumably in the conveyances or legal documents subsequent to that deed are not before the Board; and whether their descriptions are sufficient to give color of title is a factual question which depends upon the specific lands claimed. See Outline Oil Corp., 95 IBLA 255, 259 (1987); Arley Taylor, 90 IBLA 313, 316-17 (1986). Likewise, until the specific land at issue has been identified, the question whether there are valuable improvements cannot be reviewed. See Decisions at 8.

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. ' 4.1, the August 26, 1998, decisions of the Nevada State Office, BLM, are

affirmed as to the 160-acre limitation and in other respects are set aside, and the cases are remanded for further review consistent with this opinion.

In light of the remand, Silverado's petition for hearing is denied and LLV's request for an opportunity to respond to Silverado's Reply is denied.

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Will A. Irwin  
Administrative Judge

I concur:

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John H. Kelly  
Administrative Judge